Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1417

HUMANE SOCIETY OF AUSTIN AND TRAVIS COUNTY,
Petitioner,

v.

THE AUSTIN NATIONAL BANK, EXECUTOR OF THE ESTATE OF MARY MAYFIELD GUTSCH, DECEASED, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF OF RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	3
Statement of the Case	3
Argument	6-21
1. The Decision Below Is Clearly Correct	6
2. There Is No Conflict of Decisions	19
Conclusion	21
Certificate of Service	21

CITATIONS

Cases

American Legion Post No. 90 of Village of Mamaroneck, v. First National Bank and Trust Company of Mamaroneck, 113 F.2d 868 (2d Cir., 1940)	7, 10, 11
City of Austin v. The Austin National Bank, 488 S.W.2d 586 (Tex. Civ. App. Aus. 1972)	5
City of Austin v. The Austin National Bank, 503 S.W.2d 759 (Tex. Sup. 1973)	3, 5
First National Bank v. Weaver, 225 Ala. 160, 140 So. 420 88 A.L.R. 201 (1932)	10
First National Bank v. Basham, 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 (1939)	10
Humane Society of Austin and Travis County v. Austin National Bank, Executor of the Estate of Mary M. Gutsch, Deceased, 517 S.W.2d 323 (Tex. Civ. App., Beaumont, 1974)	2, 6
Humane Society of Austin and Travis County v. The Austin National Bank, Executor, 531 S.W.2d 574 (Tex. Sup., (1975)	1, 6
Johnson v. Peckham, 132 Tex. 148, 120 S.W.2d 86, 120 A.L.R. 720 (1938)	19

	Page
Magruder v. Drury, 235 U.S. 106 (1914)	19
Meinhardt v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1 (1928)	20
Republic National Bank and Trust Company v. Bruce, 130 Tex. 136, 105 S.W.2d 882, 884 (1937)	13
Slay v. Burnett Trust, 143 Tex. 621, 187 S.W.2d 377 (1945)	19
Texas and Pacific Railway Co. v. Pottorf, 63 F.2d 1 (5th Cir. 1933)	14

Statutes

Texas Banking Code, Article 342-604	10
Texas Trust Act, Article 7425b-11	20
28 U.S.C. § 92a (Pub. L. 87-222, Sept. 8, 1962, 78 Stat. 668)	2, 7, 11, 14
28 U.S.C. § 248 (a), Federal Reserve Act, § 11 (k)	7, 11

Regulations

Comptroller of the Currency; 12 C.F.R. § 9.10	2, 3, 7
Comptroller of the Currency; 12 C.F.R. § 9.12	3
Federal Reserve Board; Regulation F	7

Digest and Texts

76 Am. Jur.2d "Trusts" § 375, pps. 588-589 (1975)	13
Bogert "Trusts and Trustees", 2d Ed. § 543 (j) p. 48	20
Michie on Banks and Banking, 1973, Volume 5 B, § 313, pps. 235-236	16

Congressional Committee Report

1962 U.S. Code, Cong. & Adm., News, 2735	11

In The

Supreme Court of the United States

October Term, 1975

No. 75-1417

Humane Society Of Austin And Travis County,
Petitioner,

v.

The Austin National Bank, Executor Of The Estate of Mary Mayfield Gutsch, Deceased, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

BRIEF OF RESPONDENTS IN OPPOSITION

To The Honorable Supreme Court Of The United States:

The Respondents, The Austin National Bank, Executor of the Estate of Mary Mayfield Gutsch, Deceased, and the firm of Hart, Keahey, & Hart, Respondents, respectfully submit this opposition to the petition for a writ of certiorari to review the judgment of the Supreme Court of Texas.

OPINIONS BELOW

The opinion of the Texas Supreme Court is reported in *Humane Society of Austin and Travis County, Petitioner* v. *The Austin National Bank, Executor of the Estate of*

Mary Mayfield Gutsch, Deceased, et al., Respondents, 531 S.W.2d 574. The opinion of the Texas Court of Civil Appeals, which was affirmed by the Texas Supreme Court, is reported in *Humane Society of Austin and Travis County, Appellant* v. *Austin National Bank, Executor of Estate of Mary M. Gutsch, Deceased, Appellee,* 517 S.W.2d 323.

JURISDICTION

Petitioner asserts jurisdiction under the provisions of 28 U.S.C. § 1257(3). Apparently Petitioner's claim of jurisdiction is that it has asserted, and has been denied, a right under a federal statute, 28 U.S.C. § 92a, which is not referred to in the petition under the heading "Statute Involved" but which is copied in the later part of Appendix B to the petition, relating to the authority of the Comptroller of the Currency to authorize national banks to exercise certain powers as fiduciaries, including the powers of executor, and to regulate the exercise of such powers. Two of the regulations which have been promulgated by the Comptroller of the Currency are 12 C.F.R. Section 9.12, relating generally to the subject of "Self-Dealing", and 12 C.F.R. Section 9.10, relating to "Funds Awaiting Investment or Distribution." The Petitioner apparently contends that the first of these regulations is applicable. All of the lower courts held that the second regulation, 12 C.F.R. § 9.10. was the applicable regulation and that the Respondent Bank properly acted under the provisions of this regulation.

QUESTION PRESENTED

There is really only one question in this case, which is whether the Texas Supreme Court properly held that 28 U.S.C. § 92a, and the Comptroller's Regulation, 12 C.F.R. § 9.10, legally justified the action of the Respondent Bank pending the outcome of the case involving the construc-

tion of the Decedent's will, in purchasing certificates of deposit in its own commercial bank, on which it paid its regular "published rates" of interest, and which deposits were secured 100% by securities approved by the Comptroller of the Currency.

STATUTE INVOLVED

Under the heading of "Statute Involved" Petitioner does not cite any statute but refers to a regulation of the Comptroller of the Currency, 12 C.F.R. § 9.12, which relates to the general subject of "Self Dealing" by national banks. As we have stated above, in fact the statute involved is 28 U.S.C. § 92a, paragraphs (a)-(e) copied in the second half of Appendix B, attached to the petition for certiorari. While the regulation regarding "self-dealing", 12 C.F.R. § 9.12 applies as a general rule to national banks, it clearly does not apply to the specific situation covered by the other regulation of the Comptroller of Currency relating to "funds awaiting investment or distribution", 12 C.F.R. § 9.10.

STATEMENT OF THE CASE

The statement of the case in the petition for certiorari is, we submit, inadequate and the following brief summary is necessary to an understanding of the case and the issues involved.

The decedent, Mary Mayfield Gutsch, died in Austin, Texas, on October 19, 1971, leaving a holographic will (copied in the opinion of the Texas Supreme Court construing the will, *City of Austin* v. *The Austin National Bank,* 503 S.W.2d 759, at 760), in which she undertook to dispose of an estate appraised at more than $1,600,000.00 to the City of Austin, eight individuals, the Petitioner the Humane Society of Austin and Travis County, and another charity, Goodwill Industries.

Near the beginning of her will, Mrs. Gutsch said, "I want the Austin National Bank to administer my estate". The Bank offered the will for probate and the County Court of Travis County by order dated November 1, 1971, probated the will and appointed the Bank dependent executor, which meant under the Texas law that generally speaking the Bank as executor had to apply for and secure the approval of the Court for all that it did, the will not providing for an independent executorship under the Texas law.

As Mrs. Gutsch wrote her will, she left many questions regarding the disposition of her estate which required a judicial construction of the will. The Bank, in its capacity as executor, filed a will construction suit in the District Court of Travis County, Texas, making all of the beneficiaries defendants and also, as required by Texas statute, making the Attorney General of Texas a defendant, because some of the beneficiaries were charities.

There were numerous questions involving the rights as between the named beneficiaries to parts of Mrs. Gutsch's estate. Since all of the beneficiaries were represented by their own attorneys and the Attorney General was authorized to protect the interests of the charities, the Bank took no active position in any of the controversies between the beneficiaries. However, there was one issue between the Bank and the Humane Society in which the Bank alone had standing to present what it considered to be the proper construction of Mrs. Gutsch's will. That question was whether the will created a perpetual charitable trust of all of the income from the residue of the estate (approximately ⅔ of the estate property) or whether it made a gift outright of the entire residue to the Humane Society. The will provided that "all of the income from the remainder of my estate shall go to the Humane Society" but it made no provision regarding the principal of the remainder. If

under the law, the will created a charitable trust, the duty of the Bank as executor was to hold the principal of the remainder and pay only the income to the Humane Society. On the other hand, if the will should be construed to be an outright gift of the remainder to the Humane Society, then the duty of the Bank was to deliver to the Humane Society the principal as well as all income from the residue.

The Bank took the position that a charitable trust was created; the Humane Society took the position that the will made an outright gift of the remainder to the Humane Society.

The judgment of the trial court, dated March 8, 1972, held that a charitable trust was created. This holding was affirmed by the Court of Civil Appeals in *The City of Austin* v. *The Austin National Bank,* 488 S.W.2d 586 (Tex. Civ. App., Aus., 1972), but the Supreme Court of Texas reversed the judgments of the lower courts and held that an outright gift of the remainder to the Humane Society was intended by Mrs. Gutsch's will. *City of Austin* v. *The Austin National Bank,* 503 S.W.2d 759 (Tex. Sup., 1973, rehearing den'd, 1/16/74). The Bank as executor, then distributed the part of the residue it still held to the Humane Society. A total amount of principal and interest of about $1,500,000.00, has been distributed to the Humane Society.

During the time that the Bank had been acting as executor and performing the duties which were required of it by the Texas law, including the gathering together of all of the assets, the preparation and filing of an inventory, the payment of claims, the preparation and filing of tax returns, the safeguarding of the property, the keeping of records, the filing of reports, securing necessary orders, and the distribution of the parts of the property bequeathed

or devised to various beneficiaries, the Bank collected no commissions for its services. On February 15, 1974, the Bank filed its claim for a total commission of $40,000.00, reciting that the statutory commission permitted by the Texas statutes would have been substantially more. There is no question in this case but that the amount of the commission was within the law and reasonable for the services rendered. The sole question is whether the Bank should be required, in effect, to forfeit its commission to the Humane Society because of its action, pending the final determination of the will construction case, in using part of the estate's funds to purchase certificates of deposit in its commercial bank. (The Humane Society also claimed that the Bank's attorneys were not entitled to fees to be paid from estate funds for their services on the appeal of the will construction case, but since this question involves purely a question of state law, it will not be discussed in this brief.).

The County Court allowed the Bank's claim for commissions in the amount it asked, and the action of the County Court in allowing these commissions has been upheld by the Texas appellate courts. *Humane Society of Austin and Travis County* v. *Austin National Bank, Executor of the Estate of Mary M. Gutsch, Deceased,* 517 S.W.2d 323 (Tex. Civ. App. Beaumont, 1974), and *Humane Society of Austin and Travis County* v. *The Austin National Bank, Executor,* 531 S.W.2d 574 (Tex. Sup., 1975).

ARGUMENT

1. The Decision Below Is Clearly Correct.

The proper decision of this case, in so far as it involves any federal question, depends on the proper construction

of the first five paragraphs of 12 U.S.C. § 92a, paragraphs (a)-(e), and the construction by the Comptroller of the Currency of these statutory provisions in the regulations he promulgated relating to funds held in a fiduciary capacity, awaiting investment or distribution, contained in 12 C.F.R. § 9.10. A brief historical outline of the background of this statute (which is officially Pub. L. 87-222, § 1, September 28, 1962, 78 Stat. 668) and of the Regulation referred to should be given for a proper understanding of the case.

Before the enactment of the 1962 Act referred to above, the authority to grant permits to National Banks to act in fiduciary capacities was vested in the Board of Governors in the Federal Reserve System by the Federal Reserve Act, § 11 (k), 12 U.S.C. § 248 (k), which contains substantially the same provisions as are now found in 12 U.S.C. 92 (a), paragraphs (a)-(e). Under the authority of this statute, the Board of Governors of the Federal Reserve System had issued their Regulation F which interpreted the words funds held in trust "awaiting investment" to include funds received and held in trust "awaiting investment or distribution." While this statute and this regulation were in effect, the question of the proper construction of the statute and the regulation came up in the case of *American Legion Post No. 90 of Village of Mamaroneck* v. *First National Bank and Trust Company of Mamaroneck,* 113 F.2d 868 (Second Cir., 1940). The facts in that case were that funds had been placed with the Bank and Trust Company which had been raised for the purpose of the erection of a community house as a memorial for the veterans for the First World War. The Bank treated the funds as trust funds and carried them in its trust department and set aside securities for the protection of the funds as provided in the statutes and the regulation

of the Board of Governors of the Federal Reserve System then in effect. Interest at the rate of 3% per annum was paid on these funds. Later the Bank and its successor bank became insolvent, and the question was whether the beneficiaries of the trust fund were entitled to a lien on the securities which had been set aside in conformity with the regulation of the Board of Governors of the Federal Reserve System. The parties claiming that the lien should not be enforced asserted that the regulation exceeded the authority granted in the statute regarding funds "awaiting investment" so as to include "funds awaiting investment or distribution.". The Court of Appeals, in an opinion written by Judge Charles E. Clark, held that the regulation was authorized by the statute and that the Bank had properly placed the trust funds in its commercial bank in a time deposit, and had properly set aside securities for the protection of the fund. We quote the relevant parts of the Court's opinion (113 F.2d at 872-873):

> "Perhaps more serious is the further claim that these were not funds held in trust 'awaiting investment, and hence without the statute. We think, however, that this is too narrow a construction of the statute, and really defeats its intent. If trust funds held for investment are subject to the statute, but trust funds held for distribution are only general assets of the bank, then we find a serious difference in result following from a very slight, even formalistic, change in the relations of the parties. It would be no great stretch to term this a fund held "for investment', particularly since the desire of the subscribers for some increment on their funds was made so clear. It was not to be fully paid in for a year and a half; it was to bear interest at a substantial rate, it was subject to various difficulties of adjustment, including income tax litigation and other litigation which remained unsettled on the bank's failure more than four years after the first receipts were had.

Moreover, a broader interpretation should be given to the statute. We think that the provisions for security include in general the fiduciary funds which the bank is required to keep segregated from its general assets. Such, indeed, is the view taken by the Board of Governors of the Federal Reserve System in their Regulation F promulgated under the power to issue regulations granted by this same statute. This regulation provides that when funds received and held in the trust department if a national bank 'awaiting investment or distribution' are deposited in the commercial or savings department of the bank to the credit of the trust department, security for the deposit must be provided in the shape of United States bonds or other specified assets of the bank."

". . .

"With respect to a regulation required by the statute for the carrying into effect of its terms, we should not hesitate to take judicial notice so far as is necessary. The point is not decisive here, since all we are saying is that the interpretation made by the Board of Governors of the Federal Reserve System accords with our own. It also accords with the conclusions reached in the other cases cited. Carcaba v. McNair, supra; Fesenmeyer v. Ticonic Nat. Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184."

The decision of the Court of Appeals in this case was not appealed to the Supreme Court. We submit that it is reasonable to assume that the reason there was no appeal or attempt to take the case to the Supreme Court by a petition for writ of certiorari was that the decision was clearly right. As the Court well knows, Judge Charles E. Clark, the author of the opinion in the *Mamaroneck* case, was recognized as an extremely able judge. See for example, Memorial Proceedings in his honor in the preface to 328 F.2d, pps. 5-23 (1964).

So far as we have been able to discover, no case has questioned the conclusion reached by the Court in the Mamaroneck case. The only two other cases discussing the statute (12 U.S.C. § 248 (k)) were Alabama cases, *First National Bank* v. *Weaver,* 225 Ala. 160, 142 So. 420, 88 A.L.R. 201 (1932), and *First National Bank* v. *Basham,* 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 (1939). These cases held that the deposit of funds by the National Banks in their trust departments, pending distribution, was authorized by 28 U.S.C. § 248 (k) and further went on to hold that a similar rule would be applied to Alabama state banks. In the Alabama cases, it was held that the Bank was not even liable for interest, having complied with the regulation by depositing securities for the trust funds. In the first case, 88 A.L.R. at 205, the Court said that "we are of the opinion that under the facts herein disclosed, there appears to be no self-dealing or advantage or profit within the condemnation of the rule of decisions", and in the second case, 125 A.L.R. at 662, the Court said that "as a business proposition, such deposits may enable the trustee to do a good service to the trust estates at less expense" and that the transactions in question should be upheld because they were "in the common interest of the trustee and the trust estates in his keeping."

It may be also noted that in the decision of the Supreme Court of Texas which is involved in this case (Petition, Appendix A, p. A-5) the Court quotes Article 342-604 of the Texas Banking Code which provides in substance for the deposit of trust funds by a State Bank awaiting investment, provided securities are set aside by the Bank to insure the repayment of the trust funds. The Supreme Court (Petition, Appendix A, p. A-7) agrees with the construction of the Federal statute in the *Mamaroneck* case and holds that as a matter of state law the same construction of the Texas Banking Code should be adopted.

The control of National Banks was changed from the Board of Governors of the Federal Reserve System to the Comptroller of the Currency in 1962 by Pub. L. 87-222, and is now codified as 12 U.S.C. § 92a. The United States Senate Report on the 1962 Bill is found in 1962 U.S. Code Cong. & Adm. News, p. 2735. The report refers to the existing statute, 12 U.S.C. § 148 (k) and says that the 1962 Act will make no change in the substative provisions of the existing law other than to transfer the authority from the Board of Governors of the Federal Reserve System to the Comptroller of the Currency, "so that there is no alteration of existing law regarding national banks in fiduciary capacities."

The Senate report makes no reference to the decision in the *Mamaroneck* case, which had been decided twenty-two years earlier, but we submit, that it is only reasonable to assume that the Congress was aware of the construction of the statute which had been given in the *Mamaroneck* case, and the fact that no alteration was made in the existing law regarding the actions of national banks in fiduciary capacities is, we submit, a proper basis for the inference that the Congress was satisfied with the construction in the *Mamaroneck* case.

Returning to the specific facts in this case, which are not in dispute, the statement made in the petition for certiorari is incomplete and likely to give the wrong impression regarding the action of the Respondent Bank in this case. We therefore add the following summary.

At the time of her death, Mrs. Gutsch owned substantial blocks of stock in the First National Bank of Dallas and the Merchants and Planters Bank of Sherman, Texas. During the pendency of the will construction suit, the Humane Society as beneficiary of all of the income on the residue,

was being paid by the Bank periodically. However, the Humane Society desired to have a greater income than was being produced by the dividends on the bank stocks referred to. The Respondent Bank had no authority to sell any of the estate under the provisions of the will and under Texas law could not make any such sale without a court order. Furthermore, the Respondent Bank was of the opinion that the stock in the Dallas and Sherman Banks had a potential for growth in the value of the principal which might well outweigh any increased income that might result from a sale of the stocks and the purchase of other securities. However, the Humane Society insisted upon the sale of these bank stocks. Before it would ask the Court for authority to make the sale, the Respondent Bank insisted that the Board of Directors of the Humane Society adopt a resolution requesting the Bank to sell the stocks at not less than stated prices and agreeing to indemnify the Respondent Bank and hold it harmless against any loss that might result if, in fact, the bank stocks should increase in value more than the increase in income which would result from their sale and the purchase of other securities yielding a higher rate of income. The Board of Directors of the Humane Society adopted this resolution, and therefore the Bank, joined by the Humane Society, applied for an order of sale, which included the stocks of the banks in Dallas and Sherman. The result was the order which is copied as Appendix C in the petition for certiorari, dated September 15, 1972.

The impression which the petitioner apparently wants the Court to have from its statement for the sale of these stocks is that the Respondent Bank was forced to make this sale by the order of the County Court. The facts are that the Respondent Bank applied for and obtained the order of the Court, in an effort to comply with the wishes of the Humane Society.

The Court will note that the order of the Probate Court provided that the Respondent Bank was authorized to purchase with the proceeds of the sale designated securities, including "certificates of deposits in banks". There is nothing in the order that requires the Respondent Bank to use the proceeds to purchase certificates of deposit in *other* banks. The decision of the Respondent Bank was to purchase certificates of deposits in its own commercial department, secured, as required by the applicable federal statute and the regulation of the Comptroller of the Currency, by approved securities equal to the full value of the trust funds with which the certificates of deposit were purchased.

The principal reason which motivated the bank in purchasing certificates of deposit in its own commercial department was that such certificates of deposit would be 100% insured by the deposit of approved securities. It is settled law in Texas that "the safety of the trust funds is the first care of the law, and on this depends every rule which has been made for the conduct of trustees." See *Republic National Bank and Trust Company* v. *Bruce*, 130 Tex. 136, 105 S.W.2d 882, 884 (1937). The Texas law is, so far as we know, universally followed in other jurisdictions, as shown, for example, in 76 Am. Jur. 2d "Trusts" § 375, pps. 588-589 (1975), where it is stated that in handling funds in a fiduciary capacity, "safety is always a prime consideration" and that safety is "the first and income the second consideration."

The Respondent Bank used $550,000 of the proceeds of the sale of the Dallas and Sherman bank stocks in purchasing certificates of deposit beginning on September 28, 1972. It used an additional $330,000 of these proceeds in purchasing other certificates of deposit beginning on November 16, 1972. Beginning January 14, 1974, it combined

the certificates of deposit in one certificate for $883,000.00, bearing 9% interest. In every instance the Respondent Bank paid at least the "published" rate, or, in other words, the regular rate that it paid to its regular customers on certificates of deposit in like amounts.

No other Bank could have secured the deposits by setting aside securities, as the Austin National Bank was authorized to do in the present case. See for example, *Texas and Pacific Railway Co.* v. *Pottorf,* 63 F.2d 1 (5th Cir. 1933), in which the Court held that while the Bank was authorized to give security for money which is borrowed from others, it had no authority, generally, to pledge its assets for deposits. The exceptional situation involved in this case, and permitted by 28 U.S.C. § 92a and the regulations of the Comptroller of the Currency, 12 C.F.R. § 9.10 would not of course, apply to banks other than Respondent Bank, which other banks were not holding the funds of the Gutsch estate in a fiduciary capacity.

Moreover, by depositing the funds in its own commercial bank, the Respondent Bank was able to mature certificates of deposit early and replace them with other certificates in equal amounts bearing higher rates of interest, which was an important advantage during the period in question when rates of interest were fluctuating widely. No other bank would allow the early maturity and the issuance of other certificates of deposit bearing higher rates of interest.

For all of the reasons stated above, it is submitted that the Austin National Bank acted properly in depositing the proceeds of sales of the Dallas and Sherman Bank stocks in certificates of deposit in its own commercial bank. In fact, it is submitted that the Respondent Bank would have been delinquent in its duties had it failed to give proper

consideration to the primary requirement that funds held in their fiduciary capacity should be so used that there is no danger of any loss of the fiduciary funds.

Petitioner asserts that other institutions were paying higher rates of interest than those paid by the Respondent Bank on the certificates of deposit. However, testimony to this effect related to certificates of comparable size which, however, were unsecured, except by the $20,000 insurance provided by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation in effect at that time. It is submitted that as a matter of common knowledge investments which are 100% secured generally bring a somewhat lower rate of interest than unsecured investments.

However, we do not want the Court to get the impression that the Respondent Bank paid any lower rate of interest on the certificates of deposit purchased with the funds of the Gutsch Estate than it paid at the same time to its regular customers on similar certificates of deposit which could not be secured because they were not funds held by the Bank in a fiduciary capacity and therefore did not come under the statute and the Comptroller's regulation involved in this case. The undisputed testimony is that the bank paid at least as much interest on the Gutsch estate certficates of deposit, even though they were fully secured, as it paid on unsecured certificates of deposit to its regular customers, and on occasions paid slightly more than the "published rates".

The Petitioner also asserts that Respondent Bank made a "profit" out of the purchase of its own certificates of deposit. There was no evidence that the Bank in fact realized from the use of these funds more than it paid on the certificates of deposit, particularly when it is borne in

mind that the Bank set aside, as it was required to do, securities at least equal in value to the amounts of the certificates of deposit. The setting aside of these securities prevented the bank from using them to secure other deposits, such as deposits of public funds. The important consideration, however, is that these certificates of deposit were 100% secured, which security could not have been obtained in any other bank or in any savings institution.

The argument in the petition that the Respondent Bank was making "investments" and not "deposits" when it purchased certificates of deposit in its own commercial bank, is of course without substance. Certificates of deposit are simply one kind of a deposit. See for example 10 Am.Jur.2d "Banks" § 45, p. 426 and *Michie on Banks and Banking*, 1973, Volume 5B, § 313, pps. 235-236, where it is said:

> "The basic principles which govern other type of bank deposits are applicable to certificates of deposit."

We frankly are at a loss to understand exactly what the Petitioner means by the second paragraph from the bottom of page 9 of the petition. Apparently the Petitioner argues that it would be all right to make a demand deposit of the estate's funds with its commercial bank, but that it was improper for the Respondent Bank as executor to purchase certificates of deposit which brought the Humane Society an income according to the terms of the certificates of deposit. Of course both demand deposits and certificates of deposit represent obligations on the part of the Bank to repay money that has been deposited with it. If anything, it seems clear to us that the distinction which should be made should be in favor of certificates of deposit paying an income to the Humane Society as contrasted with demand deposits which would simply require the Bank to

repay the principal amount of the deposit without paying any income or interest.

Petitioner makes a play on words regarding "investments". Of course the bank stocks of the Dallas and Sherman banks were themselves investments, made by Mrs. Gutsch and her deceased husband, which were held by the decedent at the time of her death. The sale of these investments by the Bank and the purchase of certificates of deposit were "reinvestments" of the proceeds of such sale. Obviously, however, what the statute and the Comptroller's regulation contemplated when they said funds "awaiting investment" was funds awaiting *permanent* investment. Where the proper disposition of the funds could not properly be determined until the conclusion of the will construction case, then it is submitted that, within the meaning of the statute, the funds were properly designated as funds "awaiting investment". If the Supreme Court had held that a perpetual charitable trust had been created, then the Bank as trustee, would be authorized to make *permanent* investments, taking into account the security of such investments and the income that they would yield for the benefit of the Humane Society. On the other hand, as long as there was a possibility (which turned out to be the case) that the will would be construed to make an outright gift to the Humane Society of all of the residue, the Bank could not make any permanent investments, but had to hold the funds in the form of short term securities, which could be readily cashed and a distribution made to the Humane Society when the questions of proper distribution were settled. Therefore, the order provides that the executor is "authorized to purchase with the proceeds of such sale" designated short term securities, with the evident purpose that such securities could be liquidated when the will construction case finally decided when the Bank should make *permanent* investments of the funds as trust

funds, or should distribute the entire residue including principal as well as income, to the Humane Society so that it could do whatever it pleased with the cash and securities which were distributed to it by the Respondent Bank. Our purpose in pointing out this fact to the Court is not to make a play upon words with the term "investment", but simply to point out that, even though the purchase of any kind of securities could in a sense be regarded as an "investment", the type of securities that could be purchased under the Probate Court's order were not the kind of *permanent* investments which the statute and the regulation evidently intended to refer to when it spoke of funds "awaiting investment".

Petitioner also argues that, in substance, the provision in the regulation of the Comptroller of the Currency regarding funds "awaiting distribution" is in effect meaningless, since all estate funds are awaiting distribution. It is of course true that, except for the parts of the estate that are required to pay debts, costs, taxes, and other proper expenses, the funds of an estate generally are awaiting distribution according to the provisions in the will. However, of course this would not be true of the principal funds which are to be held in trust in perpetuity for a charitable corporation since, in that event, only the income is often distributable. The question was unsettled whether there was, under the provisions of Mrs. Gutsch's will, a perpetual charitable trust for the benefit of the Humane Society, which would receive all of the income from the "remainder" or residue of the estate, or whether all of the residue, including the principal as well as any accrued income therefrom, should be paid to the Humane Society.

This is obviously a case to which the statute and the regulations of the Comptroller were intended to apply. The Respondent Bank of course was under an obligation

not to pay the funds to any person who was not entitled to receive them. It could not validly distribute the principal residue of the estate to the Humane Society unless and until the Supreme Court of Texas held that Mrs. Gutsch's will did not create a perpetual charitable trust, but instead made an outright gift of the residue to the Humane Society. Promptly after this decision became final, the distribution was made by the Respondent Bank. Neither the statute nor the regulation gives any authority to a bank as fiduciary to hold trust funds such as funds of the estate, after it is clear that the funds should be distributed and in what manner and to whom. As soon as these questions were determined, the residue of the estate was distributed. Plainly until that time, the funds were "awaiting distribution" within the meaning of the Comptroller's regulation.

2. There Is No Conflict Of Decisions.

The only federal case cited in the petition which, it is claimed, conflicts with the decision of the Supreme Court of Texas in this case is *Magruder* v. *Drury*, 235 U.S. 106 (1914). That case in no way involved the statute and the regulation of the Comptroller which authorized the deposits made by the Respondent Bank in the present case. It was simply a case where one of several individual trustees made a profit by using trust funds to purchase notes from a firm of which he was a member and which charged commissions on notes which were so purchased by trust funds. The opinion in the *Magruder* case states general rules regarding the duties of fiduciaries, which have simply no application to the actions of the Respondent Bank, which under *specific* statutory and regulatory authority.

Petitioner also cites two Texas cases, *Slay* v. *Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377 (1945) and *Johnson* v. *Peckham*, 132 Tex. 148, 120 S.W.2d 86, 120 A.L.R. 720 (1938); a New York case, *Meinhardt* v. *Salmon*, 249 N.Y.

458, 164 N.E. 545, 62 A.L.R. 1 (1928); and a text, *Bogert "Trusts and Trustees"* 2d Ed. Sec. 543 (j) p. 48, as being in conflict with the decision of the Supreme Court of Texas in the present case. Even if this were so, there would not be the kind of conflict which would authorize the granting of a writ of certiorari in the present case. However, an examination of these cases and of the texts shows that the cases involved entirely different situations, showing fiduciary misconduct and not actions authorized by any statute or regulation, as in this case; and that the text is speaking of the general situation, and not of the specific situation involved in this case. The Supreme Court of Texas in this case recognized the wisdom of the general rules, but it also recognized that in the particular facts in this case, the Respondent Bank had not been guilty of any fiduciary misconduct and, in fact, had acted properly and in the best interests of the Humane Society.

While the Petitioner cites inapplicable sections of the Texas Trust Act, dealing with other situations, we respectfully call the Court's attention to the part of the Texas Trust Act which deals with the situation comparable to that in the present case. In 1943, the Texas Legislature adopted, as a part of the Texas Trust Act, Article 7425b-11, which reads as follows:

> "Art. 7425b-11. Corporate trustee depositing trust funds with self.
>
> A corporate trustee may deposit with itself trust funds which are being held pending investment, distribution, or to pay debts, provided it maintains under control of its trust department (if it has a trust department separate from its banking department) as security for such deposit a separate fund consisting of securities legal for trust investments which have at

> all times during the deposit a total market value equal to the amount of the deposit. No such security shall be required to the extent said deposit is insured or otherwise secured by or under state or federal law. The separate fund of securities shall be marked as such. Withdrawals from or additions to it may be made from time to time, as long as the required value is maintained. The income of such securities shall belong to the corporate trustee."

We quote the above statute because we think that it is only fair to the Supreme Court of Texas to make it plain that it was not going against the Texas law regarding fiduciaries in the present case but, on the contrary, was following the policy established by the Texas Legislature in the particular situation we have in the present case, which accords with the policy established by the Congress regarding national banks.

CONCLUSION

For the foregoing reasons, Respondents respectfully pray that the writ of certiorari be denied.

April 15, 1976.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the foregoing opposition to the Petition for Writ of Certiorari have been mailed, first class postage prepaid, to Mr. John B. Meadows, Counsel of Record for Petitioner, at his office address, 313 East Anderson Lane, Suite 310, Austin, Texas 78752, april 15, 1976.

James P. Hart

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